Central Law Journal.

ST. LOUIS, MO., OCTOBER 22, 1915.

ADMISSIBILITY OF HEARSAY EVIDENCE IN WORKMEN'S COMPENSATION CASES.

In California the Workmen's Compensation Statute provides that hearings before the commission shall be governed by the statute providing for compensation and the rules of practice and procedure it adopts and neither it nor any member of the commission nor any referee appointed by it "shall be bound by the technical rules of evidence." It is further provided that no informality "in the manner of taking testimony shall invalidate" any award by the commission.

Lately it was held by California Supreme Court that by such statute it was not competent to show by hearsay evidence the liability of an employer for any accident arising out and in the course of employment. Englebretson v. Industrial Accident Com., 151 Pac. 421.

In this case there was evidence of physicians treating employe before his death and who performed an autopsy after his death, of the possibility of a hemorrhage caused by muscular strain and there was other evidence in the way of declarations by deceased employe after he was taken sick. These declarations were that he was called to help swing a wagon round and in doing so he felt a strain in his back and immediately became sick therefrom. The court said: "The question presented is whether or not the commission has power to make an award where the only evidence of accidental injury consists of hearsay testimony." It was held it had not, and the order was that the award be annulled.

The court, in reasoning, said: "We cannot agree to the proposition that the rule against the admission of hearsay evidence as proof of a fact is a mere technical rule of evidence. No authority or decision of any court purporting to decide such a proposition is cited in behalf of the commission." A case is referred to where an award was sustained but it was said it did not rest alone on hearsay evidence, the case cited saying: "The rule against hearsay evidence is more than a mere artificial technicality of law. It is founded on the experience, common knowledge and conduct of mankind."

The instant case also says: "In view of the sound reasons for the hearsay rule, we cannot but conclude that it is not to be considered as one of the technical rules of evidence" referred to by the statute.

In 81 Cent. L. J. 254, we remarked that: "The Workmen's Compensation Act of all statutes deserves the most liberal treatment by courts. One of the prime purposes of its enactment was to produce an administrative or working system free from technical obstructions so that delays and litigation should be avoided." And in this case we find, as it seems to us, that there is applied to the California statute a construction which nullifies an important provision looking to the statute as seeking to establish an administrative system.

So far as common knowledge is appealed to to demonstrate that the hearsay rule is not "a mere artificial technicality of law" is concerned, it seems to us that the many important exceptions to its application show that it is nothing more than a technical rule.

For example, when a declarant is dead, exceptions embrace (1) declarations accompanying an act; (2) declarations against interest; (3) declarations made by a person in the course of business; (4) declarations concerning matters of public or general interest; (5) declarations concerning matters of pedigree; (6) dying declarations. Recently it has been ruled that an extrajudicial confession to the commission of a homicide, for the alleged commission of which another was on trial, was inadmis-

sible, but there was strong dissent from the view.

The rulings in which all of these exceptions were recognized were in courts governed by technical rules of evidence, and they were recognized notwithstanding that by some of the exceptions, at least, liability or culpability against an adversary thereby might be established. Are there no more exceptions admissible before a commission bound by no "technical rules of evidence?"

It seems to us that the legislature in passing such an act did not mean to take notice of a refinement such as the California Supreme Court invokes. It cannot be disputed that the legislature could in terms have prescribed that hearsay evidence could show accident, for jurisprudence has long recognized that such evidence, within the exceptions above named, could do this. And further it appears in the case before the commission that decedent made a statement regarding matters that no other could tell about. If one becomes "sick" or feels "a strain" and shortly dies, it would appear that proof by autopsy that he had a rupture possibly induced by a strain, ought to be pretty fair foundation before a tribunal bound by no technical rules of evidence for the admission of hearsay evidence tending to show how the rupture was brought on.

Sometimes we think that there is in courts a disposition to restrict the establishment and practical working of administrative boards, notwithstanding that they may be objurgators of a system where technical rules reign triumphant. In this case it might well be thought that the accident was established by the most credible of testimony. There was so very much in appeal to surroundings which either would show the general falsity of the declarations made or could be proven in their support.

We believe that since, in an enlightened country like France, hearsay evidence generally is admissible, the appeal to experience as placing its exclusion outside of mere technicality might not be so readily acknowledged.

NOTES OF IMPORTANT DECISIONS.

POLICE POWER—SEGREGATION ORDINANCES.—Virginia Court of Appeals lately has sustained the constitutionality of segregation ordinances enacted by the City of Richmond and the Town of Ashland, in which ordinances it was provided that, operating prospectively, no white person should move into what was known as a colored block and no colored person should move into a white block in such city or town. Hopkins v. City of Richmond; Coleman v. Town of Ashland, 86 S. E. 139.

The reasoning for the conclusion reached is found in an opinion by the trial court, adopted in full by the Appeals Court and this opinion is supplemented by the citation of additional authority.

The general theory is that police power rightly exercised governs rights to property and the exercise of privileges inhering in citizenship, provided only that a statute or an ordinance rests upon classification that is reasonable and the object sought pertains to public health, peace and morality. That a segregation ordinance relates to the preservation of peace, at least, is shown by sustaining statutes as to separation of the races in public conveyances and in schools. As to alleged discrimination based on supposed inferiority of one race above the other it was said long ago by the Federal Supreme Court, that: "If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction on it." Plessy v. Fergusson, 163 U. S. 537, 41 L. ed. 256. Whether such an answer seems very conclusive or not, it is certain that our Supreme Court so regarded it.

Several rulings passing on precisely similar ordinances are cited, viz., State v. Gurry, 121 Md., 534, 88 Atl. 546, 47 L. R. A. (U. S.) 1087, Ann. Cas., 1915 B. 957; State v. Dannell, 166 N. C. 300, 81 S. E. 338; Casey v. City of Atlanta, 84 S. E. 456, all of which rejected the ordinances, but the Virginia court says all of them support it in principle. As a ruling holding such an ordinance valid there was cited Harr's v. City of Louisville (Ky.), 177 S. W. 472.

It seems quite impossible to distinguish segregation legislation as to residence from that for separation of races in public conveyances and schools. If there is the purpose of preserving peace and order as to the latter, *a fortiori* is such a purpose legitimate as to the former and the right to use of property is certainly circumscribed in many ways as the advantage of civilized society may demand.

INTERNATIONAL LAW — RECOGNITION OF MORATORIUM DECLARED BY A FOREIGN COUNTRY, THE PLACE OF CONTRACT.—In Goldmuntz v. Spitzel, 154 N. Y. Supp. 1025, decided by New York Supreme Court, the action was upon a bill of exchange drawn, accepted and made payable in the Kingdom of Belgium. It was suggested in the briefs that the parties were now domiciled in the State of New York, though at the time of the transaction they resided in Belgium. Defense was interposed that, by a decree of moratorium declared by Belgium, the due date of the bill had been postponed to a time not yet arrived.

The court said: "The 'moratorium' decree affected the obligation to pay and went to the subject-matter of the contract. These defendants certainly could not have been sued with success in Belgium, and for the purposes of an action in another jurisdiction the *lex loci solutionis* is to be given identical effect, subject only to the inquiry whether the enforcement of the foreign law would be repugnant to natural justice or offensive to good morals. A law which extends the due date of commercial paper to meet an extraordinary situation, such as the disruption of a nation's business system by active warfare, does not fall within that category. * * * A comparison of laws in this instance does not present a case of a foreign law opposed to natural justice or good morals. The question is mainly one of political and geographical conditions. In this country a moratorium law has not been found exigent."

This discussion is interesting in view of the implied declaration, that our courts might be under duty to say whether a moratorium decree by a foreign country was or not justified by the circumstances of its declaration. Thus, they would have to inquire possibly into the justice of a war entered into by a nation, and, taking Belgium's case, whether or not the Kingdom, existent at the time of the declaration of a moratorium, was or not now in suspended animation or superseded. All of this would lie in the inquiry whether or not it was consistent with natural justice or good morals to continue to recognize the continuing force of the decree of moratorium.

SELF-DEFENSE—APPLYING TO GUEST THE RULE AS TO OWNER IN HIS OWN DWELLING.—We discussed, in 80 Cent. L. J. 44, citing People v. Tomlins, 213 N. Y. 240, the principle stated by Sir Edward Coke of a man's house being his castle and the safest place to him, to a guest attacked within his home, and not from the outside, and, therefore, privileged to stand and not retreat wherever he might be when attacked.

A more recent case decided by Court of Appeals of Alabama applies Sir Edward's maxim to a guest of the occupants of a house assailed in the house by an outsider. The court says: "If without his (the guest's) fault he was assaulted there by an intruder, the law imposed on him no duty to retreat therefrom, but he had the right to stand his ground and defend himself, even to the taking of the life of his assailant."

It is then said: "This doctrine only applies to the house, and the yard is not within its protection." Thomas v. State, 69 So. 315.

The facts in this case show that defendant killed deceased outside of the house, where he went to meet him, and the court rightly held, that though a guest in a house is armed for his defense, just as an owner would be, he, no more than the owner, could go outside of the house, and claim the privilege said to be embraced in the maxim.

This case was decided properly, but, as we contended in notice of the New York case, the maxim grew greatly out of eloquence in statement, rather than as announcing a hard and fast principle. Whenever a homicide is committed, the slayer pleading self-defense has the burden of showing that he was justified. If this was in the necessary, and not the mere techincal, defense of his home as a home, there is justification, otherwise, there is not. A slayer cannot stand on a mere abstract principle, and we scarcely believe that invasion of what has been accorded by courtesy or hospitality makes one defender of a home as a castle.

OUR ISSUE WITH ENGLAND OVER COTTON SHIPPED TO NEUTRAL COUNTRIES.

The English law journals are at their wits' ends in devising legal reasons consistent with existing principles of international law to justify their government in preventing cotton from the United States from reaching Germany.

We quote the following leading editorial from the Solicitors' Journal of August 21, 1915, which will no doubt be interesting to our American readers. Our learned contemporary says:

"There has been at present no formal declaration of cotton as contraband, but according to statements which have been passed for publication by the Censor, both

the French and British Governments propose at once to declare cotton absolute contraband, and the necessary steps to that end are about to be taken. We have tried from time to time to keep our readers informed as to the course of events which have led up to the present situation and the international law which governs the question. The outstanding fact is that cotton must, if possible, be kept out of Germany, and the justification for declaring cotton contraband, notwithstanding the previous British attitude on the subject, is found in its present importance for purposes of ammunition; and as soon as it acquired this character it became, apparently, not inconsistent with principle to declare it even absolute contraband. An article, though of ancipitous use, may be absolute contraband if its chief and obvious use for the time being is warlike. At the same time, the declaration by Great Britain of cotton as absolute contraband is a breach with the past, and the Government have sought to avoid it as long as possible by diverting cotton from Germany in other ways, notably by the blockade of Germany under the Order in Council of March 11th. The point in which a declaration of contraband may be more effective is that it will be within recognized international law, while the blockade under the Order in Council is still struggling for legal recognition; and the penalty of confiscation of cargo, or, if the cotton forms more than half the cargo, the ship as well, attaches, instead of diversion as under the 'blockade,' and this risk may be expected to diminish the traffic. It remains to be seen how the United States will take the new departure. It has been freely asserted that a declaration of contraband would be welcomed as clearing the air, and putting the British policy on a legal basis; but the Southern States do not want so much a legal basis for interference with their traffic, as freedom to carry on traffic 'as usual;' and unless their cotton is to be bought up, it does not appear how their desires are to be satisfied. Moreover, as far as neutral countries are concerned, a declaration of contraband affects them no more than the present blockade; the traffic with them can only be interfered with when, on the 'continuous voyage' doctrine, it is destined for Germany, and whether in any particular case Great Britain can treat the cargo as so destined will remain one of the practical difficulties of the situation."

ASSUMPTION OF RISKS ARISING FROM MASTER'S NEGLIGENCE.

Introductory.—The law imposes on every man the duty of exercising due care, not only for his own safety, but for the safety of all who may be endangered by his acts. On the part of an employer this duty requires that he use due care in respect of (1) furnishing a reasonably safe place of work; (2) furnishing reasonably safe tools, machinery and appliances with which to work; (3) warning and instructing employes in respect of the use of the instrumentalities with which they have to work, to the end that they appreciate the dangers of their work and know the best means of avoiding them; (4) employing a sufficient number of competent fellow employes. The degree of care required of him is that merely of reasonable care. What is reasonable care depends upon the nature of the place of work, or the kind of tool or machine, or whatever it is the employe is required to work with, and is always commensurate with the danger to which the employe is subjected. In respect of a simple tool, such as a hammer, the employer's duties are few and simple; but when the thing with which the employe is required to work is highly dangerous, such as electricity, his duties become manifold, and he must take the greatest pains to protect the employe from harm. The care, however, is always only reasonable in the circumstances. When the employer has performed his duty, the employe assumes the risks of the employment.

All accidents resulting in injury to an employe may be divided into three classes: (1) Those due to the negligence of the employer; (2) those to which the negligence of the injured employe was a contributing proximate cause; (3) those due to the industry or business carried on. At the common law, a servant can recover for an injury only when it comes within the first of these classes.

In this article attempt is made to show the true principle of law involved, as distinguished from those generally adhered to by the courts. What is known as the fellow servant doctrine will be ignored, as it is rather foreign to the discussion.

General Rule as to Assumption of Risk.—The true rule of law defining assumption of risk seems to be, that the employe assumes the risks incidental to the employment in which he is engaged; but that such risks are those, and those only, which necessarily attend the conduct of the business after the employer has exercised ordinary care to render the place and appliances reasonably safe. In other words, the employe assumes the risks which are incidental to the employment when conducted with reasonable care.[1]

"The law is that the employe assumes no risk not reasonably a necessary incident to the actual work in hand,"[2] says the Supreme Court of Washington.

This rule will be found to be supported by a great number of cases, but it must be said that most of the courts make so many additions and exceptions to it that it is left with scarcely any meaning. Nevertheless, it is intended to be asserted that this is the true rule of law, and that it stands complete in itself, and is subject to no exceptions.

Negligence of Master.—A few of the courts have followed the rule that the employe never assumes risks created by the negligence of the employer.[3] And while adopting the rule, others make an exception where the employe receives for use a defective appliance and with knowledge of the defect continues to use it without notice to the employer.[4]

"Under the doctrine found in the Missouri cases dealing with so-called assumption of risk, the employe does not assume the negligence of the master or that of a vice principal. The moment negligence comes in at the door, it may well be said that the doctrine of assumption of risk goes out at the window. We have here in Missouri—whether logically or illogically, we need not here pause to discuss—come to use the term 'assumption of risk' to express the mere hazards which appertain to a dangerous vocation when unaffected by the negligence of the master. When, however, the servant enters into or remains in the service of the master with actual or constructive knowledge of defects arising from the master's negligence and without a promise of remedy, we speak of this in our Missouri courts as contributory negligence."[5]

Where, therefore, a petition alleges that the employe's injuries were due to defective appliances furnished for his use by the employer, the dangerous condition of which was known, or by the exercise of ordinary care would have been known, to the employer, a plea which charges that the danger arising from the defect was obvious and known to the employe, is not a good plea of assumption of risk.[6]

Judge Allen, of the St. Louis Court of Appeals, states very clearly what seems to

(1) Barnett v. United Kansas Portland Cement Co., 91 Kan. 719, 139 Pac. 484; Chicago, R. I. & P. R. Co. v. Duran, Okla., 1913, 134 Pac. 876; Acres v. Frederick & Nelson, Wash., 1914, 140 Pac. 370.

(2) Acres v. Frederick & Nelson, Wash., 1914, 140 Pac. 370.

(3) Pine Mountain Mfg. Co. v. Bishop, Ky., 1914, 169 S. W. 1010; Jewell v. Excelsior Powder Mfg. Co., 143 Mo. App. 200, 211; Shimp v. Woods-Evertz Stove Co., 173 Mo. App. 423, 158 S. W. 864; Medina Valley Irr. Co. v. Espino, 214 Fed. 732.

(4) Southern R. Co. v. Jacobs, Va., 1914, 81 S. E. 99.

(5) Patrum v. St. Louis & S. F. R. Co., Mo., 1914, 168 S. W. 622.

(6) Curtis v. McNair, 173 Mo. 270, 73 S. W. 167.

be the correct rule on this subject. In his opinion in the case of Gambino v. Manufacturers Coal & Coke Co.,[7] he said: "It is well settled that the servant never assumes the risks of perils arising from the negligence of the master, but assumes only such risks as are ordinarily incident to his employment, after the master has performed his whole duty with respect to furnishing a reasonably safe place to work and reasonably safe appliances for performing the same."

So, in a case in which an employe was injured by a sliver of steel flying from a pin maul furnished him by his employer, it was held that the employe could not be said to have assumed the risk of such an injury if there was any substantial evidence of negligence on the part of the employer with respect to furnishing such maul.[8]

It is sometimes said that a servant assumes all risks of the employment in the condition of things at the time he enters such employment. If this were true it would relieve the employer to that extent of the duty to exercise due care, a thing that is contrary to public policy and the fundamental principles of the law. No man is ever relieved of the duty to so use his own that he does not injure his neighbor. He may not be liable to pay for an injury caused by his negligence, but this is because the injured person was guilty of some wrong—contributory negligence—and does not in the least affect his duty. If the injured person is not guilty of any wrong, he may recover. Assumption of risk could not bar his right of recovery in such circumstances, because assumption of risk is not a wrong.

Violation by Master of Statutory Requirement.—It is generally held that an employe does not assume a risk arising from his employer's neglect to comply with some statutory requirement in respect of the conduct of his business; such as a requirement that he guard dangerous machinery,[9] or saws,[10] or to provide certain ventilation for coal mines.[11]

This is placed on the ground that to apply the rule of assumption of risk would be to judicially repeal the statute.[12]

So, it is held that assumption of risk cannot arise in an action by a railroad employe seeking to recover for an injury under a statute[13] rendering railroad companies liable to employes for injuries resulting from the negligence of any person in their service to whose order or direction the injured employe was bound to and did conform.[14]

However, all of the states do not follow this rule. It is declared that under a New Jersey statute requiring machinery of every description to be properly guarded an employe may assume the risk of injury from an unguarded circular saw.[15]

Here we have the courts making a distinction between a duty of the employer under the common law and a duty imposed by statute. The common law requires the employer to use reasonable care for the employe's safety, regardless of what that may require of him. If leaving a dangerous machine unguarded is not reasonable care in that respect, he must guard it. But the courts hold that the danger created by his act of leaving the machine unguarded under such circumstances may be assumed, although such act is negligent. Thus is the common law rule which is beneficial to the

(7) Mo. App., 1914, 164 S. W. 264.

(8) Crader v. St. Louis & S. F. R. Co., Mo. App., 1914, 164 S. W. 678.

(9) Wiersema v. Lockwood & S. Co., 182 Ill. App. 11; Umina v. Moreland Co., 182 Ill. App. 236; Murray v. Daley, Ia., 1914, 146 N. W. 451; Phillips v. Hamilton-Brown Shoe Co., Mo. App., 1914, 165 S. W. 1183; Whalen v. Hugh Nawn Contracting Co., 217 Mass. 400, 104 N. E. 959; Wasiljeff v. Hawley Pulp & Paper Co., Oreg., 1914, 137 Pac. 755; Schaller v. Pacific Face Brick Co., Oreg., 1914, 139 Pac. 913.

(10) Pulse v. Spencer, Ind. App., 1914, 105 N. E. 263.

(11) Jellico Coal Min. Co. v. Walls, Ky., 1914, 170 S. W. 19.

(12) Phillips v. Hamilton-Brown Shoe Co., Mo. App., 1914, 165 S. W. 1183.

(13) Burns' Anno. Ind. St., 1908, Sec. 8017.

(14) Chicago & E. R. Co. v. Lain, Ind., 1914, 103 N. E. 847.

(15) Bakewell v. Orford Copper Co., 160 App. Div. 671, 145 N. Y. Supp. 1070.

employe set at naught by another rule of common law that is beneficial to the employer.

The courts, as we have seen, take a different view of the case where the violation is of a statutory requirement, because, they say, if the employe were permitted to assume the risk of such violation it would nullify the statute. Violation by the employer of either the common or statutory law in this respect amounts to negligence. The risks arising from one act of negligence may be assumed by the employe, while those arising from another act of negligence may not. Just what the distinguishing feature between negligence and negligence is, is rather difficult to state.

In regard to this question, it is stated in the opinion of the court in the case of New York, N. H. & H. R. Co. v. Vizvari:[16] "We confess we do not see any adequate reason for making any distinction between an obligation imposed by the common law and one imposed by statute and holding that if with knowledge of the defect one continues to work with a defective instrument furnished him in violation of a common-law obligation, he assumes the risk as a matter of law, but if the defective appliance is furnished in violation of statutory obligation he does not as matter of law assume the risk even though he had knowledge of the risk arising from the master's failure to comply with the statutory requirement. It almost seems that any such distinction is fanciful and contrary to common sense."

Assumption of Risk is a Contract.—In some states it is held that the doctrine of assumed risks is founded on the maxim, *volenti non fit injuria;* but a majority of our courts hold that it is a contract, a part of the contract of employment. We are not concerned with the correctness of either of these views, but it is assumed for the purposes of this article that the latter view is correct.[17]

"Assumption of risk is a term of the contract of employment, express or implied from the circumstances of the employment, by which the servant agrees that dangers of injury obviously incident to the discharge of the servant's duty shall be at the servant's risk. In such cases the acquiescence of the servant in the conduct of the master does not defeat a right of action on the ground that the servant causes or contributes to cause the injury to himself, but the correct statement is that no right of action arises in favor of the servant at all. for. under the terms of the employment, the master violates no legal duty to the servant in failing to protect him from dangers the risk of which he agreed expressly or impliedly to assume. The master is not, therefore, guilty of actionable negligence toward the servant."[18]

Contracts Relieving Master of Liability for Negligence Are Void.—By the great weight of authority, contracts between employer and employe whereby it is sought to absolve the former from liability for injuries to the latter due to the former's negligence, are void, as being contrary to public policy.[19]

In Great Britain and one or two of the states of this country it has been held that a master could so limit his liability by a contract supported by a proper consideration, but in the majority of the states the contrary is the law.[20]

Thus we have the two-fold proposition that assumption of risk is a contract between the employer and employe, and that any contract between these parties which

(16) 210 Fed. 118, 125, 126 C. C. A. 632, 639.

(17) St. Louis, I. M. & S. R. Co. v. Brogan, Ark., 1912, 151 S. W. 699; Pigford v. Norfolk-Southern R. Co., 160 N. C. 93, 75 S. E. 860; St. Louis & S. F. R. Co. v. Long, Okla., 1914, 137 Pac. 1156; Carter v. Kansas City Southern R. Co., Tex. Civ. App., 1913, 155 S. W. 638.

(18) Cincinnati, N. O. & T. P. R. Co. v. Goldston, 156 Ky. 410; 417, 161 S. W. 246, quoting from Narramore v. C. C. C. & St. L. R. Co., 96 Fed. 298, 37 C. C. A. 499.

(19) 5 Labatt, M. & S. (2nd ed.) Sec. 1919b.

(20) Shear. & Redf., Neg. (6th ed.) Sec. 241d; Consol. Coal Co. v. Lundak, 97 Ill. App. 109, affirmed in 196 Ill. 594, 63 N. E. 1079; Blanton v. Dold, 109 Mo. 64, 18 S. W. 1149; Johnson v. Fargo, 98 App. Div. 436, 90 N. Y. Supp. 725, affirmed in 184 N. Y. 379, 77 N. E. 388; Tarbell v Rutland R. Co., 73 Vt. 347, 51 Atl. 6.

seeks to relieve the employer from liability for his negligence resulting in injury to the employe is void, as being contrary to public policy. It is contrary to reason to say that the law forbids a contract on the ground of public policy, and yet itself creates by implication such a contract. It would seem, therefore, that an employe cannot under any circumstances agree to, and that the employer cannot agree that he shall, assume a risk resulting from the negligence of the latter.

In Curtis v. McNair,[21] the Supreme Court of Missouri said: "It is contrary to public policy to allow the master to relieve himself by contract from liability for his own negligence. What the law forbids to be done by express contract, it will not assist to be done by implying a contract. A risk which the law, on the ground of public policy, will not allow the servant to assume, it will not imply from his conduct that he has assumed."

Distinction Between Contributory Negligence and Assumption of Risk.—Assumption of risk involves no wrong doing on the part of anyone. In fact it implies that the employer has done his duty and that the injury arose through the fault of no one, but is one of those accidents which are inevitable in every enterprise. Contributory negligence involves a wrongful act or failure to act; a breach of duty on the part of the employe.[22]

In this respect the Supreme Court of Texas, in a recent case, said: "Assumption of risk is the voluntary exposure of the servant, without remonstrance, to the ordinary hazards of the particular use of machinery or appliances, claimed by him to be defective or unfit, but which condition and its dangers he knows, or must necessarily have acquired knowledge in the ordinary pursuit of his own duties. As distinguished from contributory negligence, it involves no act of omission on the part of the servant beyond his voluntarily subjecting himself to the particular hazard. Being under no obligation to exercise ordinary care to see whether the master has discharged his duty to furnish him with reasonably safe tools, machinery, or appliances, but having the right to rely upon its performance, neither are the consequences of his conduct in exposing himself to the hazard determined by that standard, but only according to whether he had knowledge of the defect and danger, or was necessarily charged with such knowledge. Herein lies the essential difference between the two doctrines."[23]

It might be observed, parenthetically, that the value of the last cited case, if it has any value, is almost lost in the intricacies of the peculiar reasoning of the court.

It is said in the case of Cincinnati, N. O. & T. P. R. Co. v. Golston,[24] that, "Of course, facts showing contributory negligence may also prove assumption of risk; but rarely, if at all, will prove that one did not assume a risk also show that at a given time he was in the exercise of ordinary prudence for his own safety."

The distinction is not always easily drawn. In one case it was said: "The distinction between contributory negligence and assumption of risk lies in the different states of mind in which they are rooted. Negligence is the result of inattention or oversight; assumption of risk implies knowledge of danger and willingness to encounter it."[25]

The distinction, however, sometimes becomes of the utmost importance, as, for instance, under the Federal Employers' Liability Act assumption of risk may bar recovery, while contributory negligence merely diminishes the amount of recovery. Assumption of risk has generally, but not always, been confined by the courts to the relation of master and servant. It means, simply, the risk of injuries and accidents

(21) 173 Mo. 270, 73 S. W. 167.
(22) Seaboard Air Line R. Co. v. Horton, 233 U. S. 492, 504, 34 Sup. Ct. 635, 58 L. Ed. —.
(23) Galveston, H. & H. R. Co. v. Hodnet, Tex., 1914, 163 S. W. 13.
(24) 156 Ky. 410, 418, 161 S. W. 246.
(25) Phillips v. Hamilton-Brown Shoe Co., Mo. App., 1914, 165 S. W. 1183.

which all human kind incur in a world where such occurrences are inevitable. It cannot be said that we voluntarily assume such risks any more than that we voluntarily assume the obligations which we, as members of society, are obliged to assume. One may voluntarily change the nature of some of the dangers he assumes by going from one employment to another, or from one kind of work to another in the same employment, but there are always risks of injury which he must bear. If one enters an extra hazardous employment the risk of injury is greater. So, too, is the corresponding duty of the master greater. But if the master has performed his duty, the employe assumes the risks of such employment, because the employment was made as safe as the required degree of care on the part of the master could make it. The risks of that employment, then, are no different than the risks incurred by any other member of the public. One may vary the degree of danger he assumes in walking along a public highway, the same depending upon the amount and nature of public travel on different parts thereof, and at the same time he and all other persons using the highway may be in the exercise of due care. The degree of risk does not necessarily change the conduct of a person from that of assumption of risk to negligence.

If the master is negligent and such negligence is the proximate cause of an injury to the servant, the latter may recover therefor unless he, too, was guilty of want of care. Want of care is always negligence, and has nothing to do with assumption of risk. Whenever it is necessary to apply the standard of due care to the conduct of an employe, the problem for solution is one of negligence and not assumption of risk.

It is not intended to be said that an employe never assumes the risk of injury from a defective machine, or appliance, or from an unsafe place of work. He does assume such risks if the exercise of due care on the part of the employer would not have discovered and remedied such defect. He may also, at the same time, be guilty of negligence if he knew of the defect or unsafe condition and continued to work and expose himself to the danger thereof when a reasonably prudent person would not have done so. But he assumes such a risk without regard to his knowledge of the defect or unsafe condition, and without regard to his exercise of care. If the defect was due to the master's negligence, then the risk is not an incident of the employment, and is not assumed. The employe can then recover for his injury if he was not contributorily negligent.

Under the following sub-headings are shown a few of what are believed to be the more common errors in the application of the doctrine of assumption of risk.

Question of the Servant's Knowledge.—Many of the cases hold that when the employe knows of the defective condition of an appliance with which he is working, or the unsafe condition of his place of work, and appreciates the danger therefrom, then, if he continues in the employment without protest, or without obtaining from the employer or his representative a promise that the defect will be remedied, the employe assumes the risk, even though it arises out of the master's breach of duty.[26]

In passing upon an instruction charging the jury in effect that the plaintiff employe did not assume any risk that arose from the employer's negligence, the court, in Terre Haute, I. & E. Tr. Co. v. Young,[27] said: "There are cases in which may be found the broad and apparently unqualified assertion that the servant does not assume the risk of dangers or perils arising from the master's negligence. An examination of such cases, however, will, for the most part, disclose that the court is speaking only of the facts then before it, and that under such facts, the risk was held not to have been assumed, because the servant was ex-

(26) This rule is so well known that the citation of authorities is not necessary.
(27) Ind. App., 1914, 104 N. E. 780, 783.

cusably ignorant of its existence, or was unable, by reason of youth or inexperience, to comprehend or appreciate it. In the ordinary case, it would be almost a contradiction of terms to assert that where the servant has full knowledge of the existence of the risk, and fully understands and appreciates the peril incident thereto, he does not assume it by continuing the employment, even though such risk arises out of, or is created by, the master's negligence."

Here, again, we have an application of contributory negligence, a want of care, in the guise of assumption of risk. What is said at other places in this article in this respect is equally applicable here.

Promise of Master to Repair.—If an employe discovers that a tool or appliance with which he is working is defective and he notifies the employer thereof, and the latter promises to repair the same, it is said that, for a reasonable time thereafter, that is, until it is apparent, under the circumstances, that the employer is neglecting to repair, or that he does not intend to keep his promise, the employe does not assume the risk of injury from such defect.[28]

"If the emergencies of a master's business require him temporarily to use defective machinery, we fail to see what right he has in law or natural justice to insist that it shall be done at the risk of the servant and not his own, notwithstanding the servant's objection to the condition of the machinery, he has requested or induced him to continue its use, under a promise thereafter to repair it. It is the master who will receive the greater benefit from the continuation of his business, and, when his employe continues to work at his request, the master, rather than the employe, should be held to have assumed the risk."[29]

(28) Missouri, K. & T. R. Co. v. Burton, Tex. Civ. App., 1914, 162 S. W. 479; Atchison, T. & S. F. R. Co. v. Sledge, 68 Kan. 321, 74 Pac. 1111; McKinnon v. Riter-Conley Mfg. Co., 186 Mass. 155, 71 N. E. 296; Fouts v. Swift & Co., 113 Mo. App. 526, 88 S. W. 167. And many other cases that could be cited, but which economy of space forbids.

(29) Perreault v. Wisconsin Granite Co., S. D., 1913, 144 N. W. 110.

Compliance with Command of Master.—In a great many jurisdictions the courts have held that where the employe, at the time he was injured, was carrying out some express command or direction of his employer, which resulted in such injury, he did not assume the risk *unless the danger was so obvious and threatening that no prudent man would have undertaken it.*[30]

The italicised portion of the foregoing rule defines negligence, a want of care on the part of the servant for his safety, which constitutes a wrong. It is erroneous, like the other illustrations given.

Conclusion.—It appears to be clear that the obligations of the master in respect of furnishing reasonably safe appliances, place of work, etc., is simply the application to his peculiar situation of the common obligation imposed on every man to use reasonable care that he injure not another; that for the violation of this rule which results in injury to another he must answer in damages, unless such other was guilty of negligence which was a concurring proximate cause of his injury; and that there is no such thing, in principle, as the assumption of a risk created by the employer's negligence.

St. Louis, Mo. C. P. BERRY.

(30) This, too, is a rule that needs the citations of no authority to support it.

TROVER AND CONVERSION—TORTIOUS TAKING.

CLARK v. WHITEHURST.

Supreme Court of North Carolina. Sept. 15, 1915.

86 S. E. 78.

An occasional employe, who took the employer's mule at night and drove it off without the knowledge and consent of the employer, was guilty of a tortious conversion, and an act indictable under Revisal 1905, § 3509; and where the mule died in his possession he was liable for its value, at least in the absence of any evidence in support of his claim that the death was accidental.

CLARK, C. J. The complaint alleges that the defendant wrongfully took from the stables of the plaintiff a bay mule, the property of

the plaintiff, without his knowledge or consent, and drove him a distance unknown to the plaintiff, and so cruelly mistreated and abused said mule that he died, and this action is to recover the sum of $200, alleged to be the value of the mule.

At the trial the evidence for the plaintiff was that the defendant, who was in the employment of the plaintiff as an ocasional laborer, took the mule in question from plaintiff's stables at night, and drove her off without his knowledge or consent, and that while in his possession the mule died; that the mule was worth $200; and he asks damages in that amount. There was evidence that the defendant was cruel to team, but no direct evidence that the death of the mule had been caused by overdriving or bad treatment, and doubtless on that ground the court directed a nonsuit. In this there was error. In Bethea v. McLennon, 23 N. C. 531, it is said:

"There is a marked distinction between the action of detinue and that of trover, though, in many cases, it is at the option of the plaintiff to bring which he will. The former asserts a continuing property in the plaintiff, and alleges the wrong to consist wholly in the withholding the possession of his goods from him by his bailee; while the latter affirms that, although they were once the proper goods of the plaintiff, they have been made the goods of the defendant, and complains of the injury caused by this conversion. If, after being thus converted, the goods perish by unavoidable accident, the loss falls upon the defendant, who has made them his; and this misfortune shall not exonerate him from answering for the prior wrongful conversion."

[1,2] The defendant in this case was not a bailee, and this was a tortious conversion under circumstances which made the defendant indictable if the evidence is true, and it must be taken as true upon a nonsuit. Revisal, § 3509; State v. Darden, 117 N. C. 697, 23 S. E. 106. Besides, though the defendant so averred in his answer, he has offered no evidence that the death of the mule was caused by accident, which at most was a matter of defense and in his knowledge. The defendant, having taken the mule wrongfully and not having returned him, is liable for his value. In Skipper v. Hargrove, 1 N. C. 27, it was held that where one had wrongfully taken a slave, who died pending the action to recover her, he was liable for her value. It is true that this case was criticised in Bethea v. McLennon, supra, but solely upon the ground that the action was brought in detinue, and not in trover, as in the present case. These refinements as to the distinction of the forms of action have now long since disappeared. But, if they had not, the present is an action, not for the specific property as in detinue, but for damages for the conversion and for the failure to return.

In Taylor v. Welsh, 138 Ill. App. 190, it was held that even in an action to recover the animal, if it proved to be in a dying condition when returned, the defendant was liable for the loss. In Sedgwick, Damages, § 536a, it is said that in replevin, if the loss to the property by death or otherwise, occurs through the default of the defendant, "he is of course responsible. There seems no reason why the same rule should not apply to the loss of other property by inevitable accident; it has been held in such case that the possessor must answer for its value, though the loss happened without his fault"—citing Jennings v. Sparkman, 48 Mo. App. 246; Suppiger v. Gruaz, 137 Ill. 216, 27 N. E. 22; Lumber Co. v. Blanks, 133 Fed. 479, 66 C. C. A. 353, 69 L. R. A. 283.

The defendant was in possession of the animal wrongfully, even criminally, if this evidence is to be believed. The animal died while in his possession. He has failed to restore it to the owner in good condition, or show any excuse, and is liable for its value. This case differs entirely from Sawyer v. Wilkinson, 166 N. C. 497, 82 S. E. 840, L. R. A. 1915B, 295, where a mule was hired to the defendant, to be returned in good condition, and the mule was burned to death when a fire destroyed the defendant's stables without any negligence on his part. In that case it was held that the bailee, being in lawful possession of the mule, was responsible only for ordinary care in its preservation and protection, and was not responsible for its destruction, and consequent failure to return it, in the absence of any negligence on his part. Though this decision is in accordance with the weight of authority, there are many cases which hold that even where the party holds under a contract of bailment, if there is a special contract to return the horse in good condition, and the horse dies in the bailee's possession, though without fault on his part, he is liable for its value as insurer. Grady v. Schweinler, 16 N. D. 452, 113 N. W. 1031, 125 Am. St. Rep. 676, 15 Ann. Cas. 161, and cases there cited.

In Doolittle v. Shaw, 92 Iowa 348, 60 S. E. 621, 26 L. R. A. 370, 54 Am. St. Rep. 562, it is held that even in a contract of bailment, if the bailee acts in such way, in violation of the terms of the contract, as to indicate an appropriation of the property temporarily, or permanently, to his own use, or exercises acts of ownership over it inconsistent with the owner's

rights, he is liable for its value, if it dies or is injured. Scott v. Elliott, 63 N. C. 215, is largely taken up with a discussion of the distinction between detinue, replevin and trover, matters which have happily ceased to be of any interest; but it holds, which is relevant to this case, that, where the action is brought for damages for wrongful conversion, the measure of damages is the value of the property at the time of the taking.

The judgment of nonsuit is reversed.

NOTE.—*Where Property is Wrongfully Withheld Loss for any Reason is no Defence.*—The principle which our caption announces is most frequently exemplified in rulings in replevin suits, where plaintiffs who acquire possession under bond fail in their actions. In an opinion by Lurton, Circuit Judge, in Three States Lumber Co. v. Blanks, 133 Fed. 479, 66 C. C. A. 353, 69 L. R. A. 283, he said: "The obligation of the plaintiff in a replevin suit does not become impossible of performance by loss or destruction of the goods replevined, because his obligation is an alternative one, and, if it has become impossible to return to defendant the goods wrongfully taken, it is not impossible to pay their value." Discussing the writ of replevin as at common law, the Judge said, among other tlings, that plaintiff "Being a wrongdoer, (he) is not permitted to set up even a blameless loss or destruction of the defendant's property, while wrongfully withheld from him, as a discharge of his obligation to return the goods or pay their value and damages."

In De Thomas v. Witherby, 61 Cal. 92, 44 Am. Rep. 542, it was said: "A plaintiff, not being the owner of goods, who takes them out of possession of the real owner, holds them in his own wrong and at his own risk. * * * When at the end, perhaps, of a protracted litigation, it is determined that the plaintiff in replevin had no right to the possession of the goods * * * he cannot on principle or authority be excused from satisfying said judgment under a plea that the property has been lost in his hands, even by the act of God."

In Suppiger v. Gruaz, 137 Ill. 216, 27 N. E. 22, affirming 36 Ill. App. 60, it was ruled that plaintiffs in replevin act at their peril, and if the property taken possession of is destroyed by fire, it is their loss, without regard to any negligence or not while it was in their possession. See as following this case, Schott v. Youree, 142 Ill. 233, 31 N. E. 391, affirming 41 Ill. App. 476.

Where one of several horses taken by a writ of replevin died, this was held not to excuse the plaintiff failing in his action. Hinkson v. Morrison, 47 Iowa 167. See also Lillie v. McMillan, 52 Iowa 463, 3 N. W. 601.

And where sheep were retained by defendant under a redelivery bond, their dying, pleaded as an act of God, was held no defense, the plaintiff being successful in his action. Blaker v. Sands, 29 Kan. 551.

In Gentry v. Barnett, 6 T. B. Mon. 113, an early Kentucky case, a slave taken in action for replevin, died pending the suit and the court, basing its ruling on a prior case, said: "It is hard to conceive of a reason supporting (the former case), which will not equally apply to the death of a slave pending the action of replevin. In the former case the defendant was charged because of his wrong only; in the latter he is not only guilty of the same wrong, but has expressly stipulated in the replevin bond that he will restore, not excepting the death of the slave." We do not for every reason approve of this reasoning, for it ought not to be deemed worse to detain wrongfully what is not taken of process, than so to detain what is. There is certainly a claim of right in the latter detention.

In George v. Hewlett, 70 Miss. 2, 35 Am. St. Rep. 626, 12 So. 857, former ruling in Whitfield v. Whitfield, 44 Miss. 254, is overruled, and it was held that defendant who gives a redelivery bond in replevin is liable for destruction of the property, though this resulted from circumstances wholly beyond his control and without his fault.

But there are some cases holding to the contrary of the above, as influenced more or less by statutes. Thus in Maine it was said that the natural death of a horse in possession of plaintiff in replevin is a valid excuse for failure to perform the condition of his bond. Melvin v. Winslow, 10 Me. 397. But this case is distinguished in a later case by the condition that the replevin suit must have been instituted and prosecuted in good faith and in the honest belief of a good title. Walker v. Osgood, 53 Me. 422.

In the New York case of Carpenter v. Stevens, 12 Wend. 589, it was held that where a bond becomes impossible of performance by the act of God or of the law, the obligors are excused. But a later New York case refused to follow this principle, ruling that: "The undertaking of the plaintiff in the replevin bond, we conceive, is absolute to return the goods, or pay their value at the time of the execution of the bond. We cannot think that a wrongdoer is ever to be treated as a mere bailee, and that the property in his possession is to any extent at the risk of the owner."

In Bobo v. Patton, 6 Heisk. 172, 19 Am. Rep. 593, the principle announced in Carpenter v. Stevens, *supra*, is sustained, but this ruling appears to have been influenced by Tennessee statute, as pointed out by Judge Lurton in Three States Lumber Co. v. Blanks, *supra*. As indicating this influence, it was held that sureties in attachment bonds are liable notwihstanding the death or destruction of the property by act of God. Barry v. Frayser, 10 Heisk. 206. The Tennessee statute referred particularly to replevin bonds.

In Missouri it was held that depreciation comes under the same rule as destruction. Miller v. Bryden, 34 Mo. App. 602; Mix v. Kapner, 81 Mo. 93. And likewise compensation for any actual injury to property wrongfully withheld by anyone in replevin. See Aber v. Bratton, 60 Mich. 357, 27 N. W. 564; Teel v. Miles, 51 Neb. 545, 71 N. W. 296; Mitchell v. Busch, 36 Ind. 529; Brennan v. Shinkle, 89 Ill. 604; Wadleigh v. Buckingham, 80 Wis. 230, 49 N. W. 745. In Oregon it is said property must be returned in the same condition as when taken. Capital Lumbering Co. v. Learned, 36 Oe. 544, 59 Pac. 454, 78 Am. St. Rep. 792.

In Illinois it was ruled that plaintiff failing to return some of the goods and returning others

injured, he is liable for all and the deterioration suffered, as well. Franks v. Matson, 211 Ill. 338, 71 N. E. 1011.

In Missouri it was ruled that the deterioration of a buggy, horse and harness is proper element of damage in wrongful detention of property. Hinchley v. Koch, 42 Mo. App. 230.

In New Jersey it was ruled that the tender of a piano in worse condition that when taken under a writ of replevin does not comply with the condition of the bond, though the depreciation is due to ordinary wear and tear from use. Johnson v. Mason, 70 N. J. L. 13, 56 Atl. 137. And so of an engine, that has similarly deteriorated. Nichols & S. Co. v. Paulson, 10 N. D. 440, 87 N. W. 977. And so as to ice which has become of less value from melting away. Findlay v. Knickerbocker Ice Co., 104 Wis. 375, 80 N. W. 436; Washington Ice Co. v. Webster, 125 U. S. 426, 31 L. ed. 799, 8 Sup. Ct. 947. Some cases have ruled that damages for injury and depreciation must be recovered in a separate action, and not on the bond. Colby v. Yates, 12 Heisk. (Tenn.) 267; Citizens' Nat. Bank v. Oldham, 136 Mass. 515; Douglass v. Douglass, 21 Wall. 98, 22 L. ed. 470. These cases avoid the rule laid down in Carpenter v. Stevens, *supra*. C.

BOOKS RECEIVED.

Limitations on the Treaty Making Power, Under the Constitution of the United States. By Henry St. George Tucker, formerly dean of the Law Schools of Washington and Lee University, and George Washington University, Washington, D. C. Editor of Tucker on the Constitution. Boston. Little, Brown & Company. 1915. Price, $5.00. Review will follow.

Corpus Juris. Being a Complete and Systematic Statement of the Whole Body of the Law, as Embodied in and Developed by All Reported Decisions. Edited by William Mack, LL.D., Editor-in-Chief of the Cyclopedia of Law and Procedure; and William Benjamin Hale, LL.B., Contributing Editor of the American and English Encyclopedia of Law and the Encyclopedia of Pleading and Practice. Vols. I, II and III. New York. The American Law Book Co. London: Butterworth & Co., Bell Yard. 1914. Review will follow.

American Annotated Cases, containing the cases of general value and authority to those contained in American Decisions, American Reports and the American State Reports. Thoroughly Annotated. Volume Ann. Cas. 1915 C. Price, $5.00. Bancroft-Whitney Co., San Francisco. Edward Thompson Co., Northport, L. I., N. Y. 1915. Review will follow.

HUMOR OF THE LAW

The judge sits on the woolsack,
The lawyer makes the plea,
The jury brings the verdict,
And the client pays the fee.
—Kansas City Bar Monthly.

There are some deficiencies in the early education of Mrs. Donahoe, but she never mentioned them or admitted their existence. "Will you sign your name here?" asked the young lawyer whom Mrs. Donahoe had asked to draw up a deed transferring a parcel of land to her daughter.

"You sign it yourself an' I'll make me mark," said the old woman quickly. "Since me eyes gave out I'm not able to write a wurrd, young man."

"How do you spell it?" he asked, pen poised above the proper place.

"Spell it whatever way you plaze," said Mrs. Donahoe, recklessly. "Since I lost me teeth there's not a wurrd in the wurrld I can spell."—Youth's Companion.

"Your Honor," said the arrested chauffeur. "I tried to warn the man, but the horn would not work."

"Then, why did you not slacken speed, rather than run him down?"

A light seemed to dawn upon the prisoner. "That's one on me. I never thought of that."—*Case and Comment.*

Magistrate—"How did you manage to extract the man's watch from his pocket, when it was provided with a safety catch?"

Prisoner—"Excuse me, sir, that is a professional secret. I am willing to teach you, however, for $10."—New York Mail.

Magistrate—So you admit having been engaged in making counterfeit money?

Prisoner—Yes, your Honor, and I thought it was all right. You see, the supply of the genuine article is so very, very short.—Case and Comment.

"I want to be excused," said the worried-looking juryman, addressing the judge. "I owe a man five pounds that I borrowed, and as he is leaving England to-day for some years, I want to catch him before he gets on the boat and pay him the five pounds."

"You are excused," returned his lordship, in icy tones. "I don't want anybody on the jury who can lie like that."

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

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1. **Abatement and Revival**—Surrender of Charter.—Where a corporation surrenders its charter, a pending suit in which it is plaintiff dies and cannot be pleaded in abatement to a subsequent suit.—Thurman v. Walraven, Ga. App., 85 S. E. 685.

2. **Absentees**—Notice.—A notice held to sufficiently inform an attorney on whom it was served as representative of an absent defendant in foreclosure, where it set forth the title and number of the suit and the name of the court, and notified him to pay the sum sued for.—Bank of Webster v. McDonald, La., 68 So. 959.

3. **Accord and Satisfaction**—Unliquidated Damages.—Where a claim is unliquidated, payment and acceptance of a less amount than claimed in satisfaction is an accord and satisfaction, but a payment of a less amount than is admittedly due is not.—Phillips v. Graham County, Ariz., 149 Pac. 755.

4. **Adoption**—Ratification.—Mutual acceptance and performance by child and foster mother of duties incident to adoption contract for 30 years, for 2 of which the mother was discovert through divorce, while the 20 years of her second marriage were subsequent to the Married Woman's Act, held to have ratified contract of adoption if voidable for foster mother's coverture.—Lindsey v. Patterson, Mo., 177 S. W. 826.

5. **Adverse Possession**—Continuity of Possession.—The occupancy of uninclosed land for the purpose of cutting timber under authority from the true owner was sufficient to break the continuity of possession of an adverse claimant.—South Texas Development Co. v. Manning, Tex. Civ. App., 177 S. W. 998.

6.——Evidence.—A contract, whereby defendants in ejectment were granted possession of all lands that they cleared and put in cultivation, upon the consideration of payment of taxes and upon specified conditions, was insufficient to sustain a claim of adverse possession.—Stellwagen v. Grissom, Mo., 177 S. W. 636.

7.——Presumption.—A grant may be presumed from long, peaceable possession of real property, accompanied by the usual acts of ownership, even against the sovereign; such presumption existing independently of the statute of limitations.—Caruth v. Gillespie, Miss., 68 So. 927.

8. **Bankruptcy**—Discharge.—Under Bankr. Act, §§ 21a, 29b(2), false and evasive testimony concerning statement to mercantile agency held not immaterial, but to justify denial of discharge, though no creditor relied on the statement.—In re Sheinberg, U. S. D. C., 223 Fed. 218.

9.——Petition to Revise.—An order requiring the holders of drafts to surrender them to trustees in bankruptcy, and giving the holders credit, held not prejudicial, so as to entitle the holders to a petition to revise.—Lazarus, Michel & Lazarus v. Harding, U. S. C. C. A., 223 Fed. 50.

10.——Wages.—That wages or salary exceeds $1,500 a year held not to prevent priority under Bankr. Act, § 64b(4), notwithstanding section 1, subd. 7.—Blessing v. Blanchard, U. S. C. C. A., 223 Fed. 35.

11. **Banks and Banking**—Notice.—A bank which accepted a draft as collateral to secure an agent's debt held chargeable with notice that the agent had no authority to use the draft for his individual purposes, where the facts were not only known to the cashier, but appeared on the face of the draft.—Bank of Hoxie v. White, Ark., 177 S. W. 891.

12. **Bills and Notes**—Estoppel.—One who circulated checks good for certain amounts in trade and cashed the same kind of checks for plaintiff and others, and had said that they were good at his store and would be paid off, was estopped to assert that there was no consideration for checks assigned to plaintiff.—Buckley v. Collins, Ark., 177 S. W. 920.

13.——Indorsee.—A note payable to the maker and indorsed by him in blank is payable to bearer, within Negotiable Instrument Law (Civ. Code 1913, par. 4154, subd. 5).—People's Nat. Bank v. Taylor, Ariz., 149 Pac. 763.

14.——Indorsement.—Note containing accommodation indorsement retained by the holder as collateral to a renewal note executed by the principal maker held not discharged, within Negotiable Instruments Act, and accommodation indorser was liable.—Night and Day Bank v. Rossenbaum, Mo., 177 S. W. 693.

15.——Prima Facie Evidence.—A note indorsed in stencil by a company, with the added words "by (a named person) pt.," held prima facie admissible in evidence as between the maker and transferee in an action on the note.—Hayes v. Carrollton Bank, Ga., 85 S. E. 699.

16.——Proof of Ownership.—Where plaintiff produced the note sued on, and testified that, though it had been indorsed as collateral, the debt secured had been paid, and that the note had never left the possession of the payees, this proved ownership in plaintiff.—Williams v. Beneke, N. D., 153 N. W. 411.

17. **Bonds**—Contract.—Where the form in which a bond is given is not prohibited by law or contrary to public policy, but is founded on a sufficient consideration, intended to subserve a lawful purpose, and entered into by competent parties, it is a valid contract at common law.—Bowen v. Lovewell, Ark., 177 S. W. 929.

18. **Brokers**—Misrepresentation.—A real estate broker who falsely misrepresented the value of land, and procured from the purchaser a price in excess of the vendor's sale price, which excess he pocketed, is guilty of fraud, and recovery may be had against him.—Hack v. Crain, Mo., 177 S. W. 587.

19.——Procuring Purchaser.—A broker held not entitled under his employment contract to compensation from the owner, where he merely found a purchaser ready, willing, and able to buy, and procured from him a written agreement to take the land, and the purchaser failed to live up to the agreement.—Hopkins v. Settles, Okla., 149 Pac. 890.

20. **Carriers of Goods**—Bill of Lading.—Provision in bill of lading requiring notice of intention to claim damages held reasonable, and compliance therewith necessary, unless carrier has actual knowledge of condition of shipment and that claim will be made.—St. Louis, I. M. & S. Ry. Co. v. Cumbie, Ark., 177 S. W. 910.

21.——Interest.—A carrier which sells property for refusal of the consignee to receive it is chargeable with interest on the proceeds in excess of the freight while they are withheld from the shipper.—Stevens-Scott Grain Co. v. Atchison, T. & S. F. Ry. Co., Kan., 149 Pac. 744.

22.——Local Law.—Where an agreement concerning further transportation over the line of a connecting carrier was made after the goods had reached the State of Arkansas, and they were only to be transported to another point in that state, the local laws govern.—Keithley v. Lusk, Mo. App., 177 S. W. 756.

23. **Carriers of Live Stock**—Limitation of Liability.—Shipper's agent who delivered horse to carrier held to have authority to bind the shipper by executing a limited liability contract based upon the declared value of the horse; the shipper being charged with knowledge that such contract was a requisite of shipment at the rate given.—Donovan v. Wells, Fargo & Co., Mo., 177 S. W. 839.

24. **Carriers of Passengers**—Boarding Cars.—A passenger attempting to board a train after it had stopped to take on passengers and during the reasonable time it was supposed to allow passengers to board assumed no risk of injury from the moving of the train so as to endanger his safety.—Huckaby v. St. Louis, I. M. & S. Ry. Co., Ark., 177 S. W. 923.

25.——Rates.—The federal court held to have jurisdiction of actions brought by stockholders of railroads to test the validity of the two-cent fare law, and to enjoin such companies from putting the rate in force during the pendency of the action.—State v. Chicago, M. & St. P. Ry. Co., Minn., 153 N. W. 320.

26.——Release.—Pullman car porter held entitled to recover from a railway company for injuries from the negligence of its servants, though his contract of employment purported to release both companies.—Murray v. Philadelphia & R. Ry. Co., Pa., 94 Atl. 558.

27.——Starting Train.—A conductor, who starts his train without inquiry as to whether a passenger who has reached his destination has alighted, is negligent.—Thomure v. St. Louis & S. F. R. Co., Mo. App., 177 S. W. 708.

28. **Commerce**—Original Package.—Newspapers published outside the state, when exposed for separate sale within the state, are no longer original packages, but are subject to state regulation.—State v. Delaye, Ala., 68 So. 993.

29. **Conspiracy**—Co-conspirator.—Where accused, who was serving life term, and another convict serving a less term conspired to escape, held that accused was responsible for the act of his co-conspirator in killing a guard.—People v. Creeks, Cal., 149 Pac. 821.

30. **Constitutional Law**—Statute.—Where a court passes on the constitutionality of a statute, in the validity of which it has a direct pecuniary interest, such court should refuse to uphold the act, unless it is clear, by reason and authority that it is constitutional.—McCoy v. Handlin, S. D., 153 N. W. 361.

31.——Verdict.—Although action is begun and issue joined before the adoption of a law authorizing nine jurors in a civil case to render a verdict, such verdict is valid, where the trial is after passage of the law.—Miami Copper Co. v. State, Ariz., 149 Pac. 758.

32. **Contracts**—Mutuality.—A dealer's contract to buy goods from a manufacturer for the next ensuing selling season, where the manufacturer, as part of the transaction, sold and delivered a large quantity of goods to be used as samples in procuring orders, held not void for want of mutuality.—Scott v. T. W. Stevenson Co., Minn., 153 N. W. 316.

33.——Stakeholder.—A stakeholder who refused to return money wagered by a party who repudiated the contract prior to the event on which the wager depended held liable by the party thus repudiating.—Hilton v. Bailey, Okla., 149 Pac. 863.

34. **Corporations**—Creditors.—Stockholders of corporation, from whom it repurchased its stock at par, rendering itself insolvent, held liable in one suit to creditor of corporation, suing after corporation's bankruptcy and trustee's refusal to sue for him.—First Nat. Bank of Laurel v. Pearson, Miss., 68 So. 921.

35.——Misrepresentation.—Misrepresentations by a corporation's agent to a subscriber for stock that the corporation would ship fruit for no one but its stockholders held a defense to an action on the note for the stock subscription.—Divine v. Western Slope Fruit Growers Ass'n, Colo., 149 Pac. 841.

36.——Rescission.—That a stockholder had brought an action to rescind his purchase of stock held not proof of his bad faith in bringing an action against the corporation and others to determine adverse claims not to show that his payment of taxes on land traded for the stock was an attempt to wrongfully absorb the assets of the corporation.—Bever v. Investors' Syndicate, N. D., 153 N. W. 476.

37.——Secret Profits.—Secret profits made by the captain of a steamboat in the trade of cotton seed held recoverable, although such trade would be ultra vires the corporation.—Memphis & Arkansas City Packet Co. v. Agnew, Tenn., 177 S. W. 949.

38.——Stockholders.—Where directors are guilty of a breach of trust, injurious to corporate assets and rights of shareholders, and the corporation refuses to sue, one or more shareholders may sue in their individual names to restrain or redress such injuries, provided the petition shows the right of the petitioners to sue.—Smith v. Oklahoma Supply Co., Okla., 149 Pac. 879.

39.——Subscription.—One induced, by fraudulent representations of the value of the assets of a corporation, to subscribe for stock, and to give a note for the price, may rescind.—People's Nat. Bank v. Taylor, Ariz., 149 Pac. 763.

40. **Covenants**—Breach.—Where land to which the grantors held the legal title was in possession of another who merely claimed under a mistaken idea as to boundary, covenant that the grantors were lawfully seized was not breached.—Stearns v. Jewel, Colo., 149 Pac. 846.

41. **Death**—Damages.—In action for death of employe, under Employers' Liability Act, damages held amount father lost by death, considering average earnings of deceased, his industry, frugality, and saving qualities, as bearing on how much father might have expected to inherit from him had he died.—Yovovich v. Falls City Lumber Co., Ore., 149 Pac. 941.

42. **Dedication**—Estoppel.—A dedication of land to a public use does not necessarily involve a parting with the fee, but gives a right to the use of the land by the public, free of interference from the dedicator, who is estopped

to set up any claim to the land inconsistent with the specific use to which it was dedicated.—De Castello v. City of Cedar Rapids, Iowa, 153 N. W. 353.

43. **Deeds**—Enlarging Grant.—Where the language describing a grant is specific and definite, as, for instance, by metes and bounds, the grant cannot be enlarged or diminished by later general description, or by mere reference to deeds through which title was obtained.—Perry v. Buswell, Me., 94 Atl. 483.

44. **Divorce**—Duress.—A decree of divorce, with stipulated alimony, obtained at the suit of the wife, but invalid by reason of the husband's duress in compelling her to bring the suit, may be set aside on that ground after the death of the husband by way of undoing what was fraudulently accomplished.—Dennis v. Harris, Iowa, 153 N. W. 343.

45.——Foreign Judgment.—A judgment of a foreign court, whereby the wife obtained a divorce from plaintiff, held not an admission of the charges made against plaintiff, which could be taken advantage of by defendant, in an action for alienating the wife's affections.—De Ford v. Johnson, Mo., 177 S. W. 577.

46. **Ejectment** — Disclaimer. — Plaintiff in ejectment is not entitled to costs because of an amendment of the disclaimer so as to include mineral rights under the surface claimed by defendant, where the delay in disclaiming did not result in additional costs.—Martin v. Howard, Ala., 68 So. 982.

47.——Source of Title.—In ejectment, where defendant claimed through an administrator's sale and plaintiff claimed by inheritance from the common source of title, it was error to refuse to allow proof of the order of sale, the confirmation thereof, and the deeds to the purchasers.—Roe Crowder v. Doe ex dem. Arnett, Ala., 68 So. 1005.

48.——Verdict.—No judgment can be entered for plaintiff in ejectment on a verdict which does not fix, with reasonable certainty, the exterior boundaries of the land in controversy.—Croston v. McVicker, W. Va., 85 S. E. 710.

49. **Electricity** — Negligence. — A company erecting a light post by cutting a girder supporting an awning extending across a sidewalk, held not liable for injuries by fall of awning by people going out on it.—Houston Lighting & Power Co. v. Walsh, Tex. Civ. App., 177 S. W. 1055.

50. **Eminent Domain**—Damages.—Railroad held not liable, to one purchasing land with notice that the road had condemned right of way, for damages occasioned by the overflow of a stream, the normal content of which was increased by the road's properly constructed embankment.—Malvern & C. Ry. Co. v. House, Ark., 177 S. W. 907.

51. **Execution**—Redemption From Sale.—Where an order setting aside an execution sale is vacated and the sale confirmed and an appeal taken and the litigation continued until after expiration of the redemption period, the court may give opportunity to redeem within a reasonable time after termination of the litigation.—Platt v. Flaherty, Kan., 149 Pac. 734.

52. **Executors and Administrators**—Contract.—Promise to pay for services rendered at another's request or with his knowledge and consent held ordinarily implied, but not if situation, conduct, or relations of parties show that there was no expectation of payment.—Hatch v. Dutch, Me., 94 Atl. 487.

53. **Fraud**—Sale of Stock.—A person selling corporate stock on a promise that the buyer will be given a salaried position with the corporation, and knowing that the promise will not be fulfilled, is guilty of actionable fraud.—Holmes v. Wilkes, Minn., 153 N. W. 308.

54. **Frauds, Statute of**—Part Performance.—Verbal contract to sell tract, only part of which was conveyed, held not taken out of the statute of frauds by purchaser's possession of the whole tract, and improvements on that conveyed, with knowledge of the facts.—Pitts v. Kennedy, Tex. Civ. App., 177 S. W. 1016.

55. **Fraudulent Conveyances**—Bulk Sales Law.—Sales in Bulk Act (Pub. Acts 1905, No. 223) does not apply to a sale of property upon a regular foreclosure of a valid chattel mortgage.—Symons Bros. & Co. v. Brink, Mich., 153 N. W. 359.

56.——Burden of Proof.—Where a wife acquired property during coverture, it is presumed that it was paid for by her husband; and in a suit by the husband's creditor's who questioned the conveyance, the wife must establish her right to the property.—Wm. J. Lemp Brewing Co. v. Correnti, Mo., 177 S. W. 612.

57. **Garnishment**—Receiver.—Where a valid garnishment merely reaches a debt due by the garnishee, the writ will not be aided by the appointment of a receiver, or the issuance of injunction restraining the assignment of the debt.—Gulf Nat. Bank v. Bass, Tex. Civ. App., 177 S. W. 1019.

58. **Highways**—Taxation.—A taxpayer cannot collaterally attack the legality of a road district in a suit to enjoin the collection of taxes by it.—Bartlett v. MacDonald, Ariz., 149 Pac. 752.

59. **Homestead**—Abandonment.—A homestead held not abandoned where the widow occupied same exclusively for ten years after her husband's death and until her children married or became able to support themselves, though for two years she had rented it by the month, retaining a room, and visited her children.—Healy v. Bismarck Bank, N. D., 153 N. W. 392.

60.——Estoppel.—Widow, whose husband died seised of 80 acres, who petitioned it be set aside to her as a homestead, alleging he was possessed of only 60 acres, she knowing he had formerly owned extra 20 acres, but had relinquished claim thereto, held not estopped to claim title to such 20 acres against grantor of her husband's heirs.—Birmingham Securities Co. v. Hodges, Ala., 68 So. 980.

61. **Homicide**—Degrees.—The only substantial distinction between murder in the first and second degrees is that in murder in the first degree the killing must be done with a premeditated design to effect death, and, in the second degree, such design need not appear.—Boyett v. State, Fla., 68 So. 931.

62. **Husband and Wife**—Separate Property.—A joint statement by a husband and wife as to their assets to secure advances to either or both of them renders the property thereby included liable for advances to the husband, though it was the sole property of the wife.—Wood v. Yant, Colo., 149 Pac. 854.

63. **Insurance**—Liability.—Under an accident insurance policy not specifying when an accrued indemnity should be payable, the liability accrues when the accident occurs, and payment should be made when proof of this liability is made to the insurer, and interest should be allowed from the date such proof is furnished.—Amer. Nat. Ins. Co. v. Fulghum, Tex. Civ. App., 177 S. W. 1008.

64.——Theft.—A policy insuring against theft from a safe entered by the use of tools or explosives applied to the outside thereof held not applicable where the only force was applied to the frame and cash box within the safe.—Frankel v. Massachusetts Bonding & Ins. Co., Mo. App., 177 S. W. 775.

65.——Warranty.—A warranty must be literally true, and its materiality cannot be the subject of inquiry, as distinguished from a representation which needs only to be substantially true, and the falsity of which, if not material, will not, in absence of fraud, invalidate the policy.—Citizens' Nat. Life Ins. Co. v. Swords, Miss., 68 So. 920.

66. **Interpleader**—Jurisdiction.—Where interpleader was within the jurisdiction of the circuit court, the parties were before it, the fund in its custody, and the point decided within the issues, it had jurisdiction to appoint a commissioner to sell the property and hold the proceeds.—Griswold v. Haas, Mo. App., 177 S. W. 728.

67. **Judgment**—Res Judicata.—The recovery of damages for permanent injury from partial destruction of the estate caused by a nuisance does not bar an action for loss resulting from subsequent diminution of rental values caused by an increased burden.—Pratt Consol. Coal Co. v. Morton, Ala., 68 So. 1015.

68.——Void.—A default judgment against A., B., and C. individually on a note held not void.

as not authorized by the pleadings, though the petition showed that their signatures were followed by words describing them as trustees.—Clark v. Lunsford, Ga., 85 S. E. 705.

69. **Judges**—Constitutional Law.—Laws 1911, c. 239, giving to the judges of the supreme court a certain sum per month to cover their increased expenses caused by removal to the capital, held not violative of Const. art. 21, § 2, or article 5, § 30.—McCoy v. Handlin, S. D., 153 N. W. 361.

70. **Jury**—Pleadings.—Const. art. 2, § 28, preserving the right to trial by jury, does not prevent the court from sustaining a demurrer to the evidence, where it is insufficient to sustain a verdict for plaintiff.—Smith v. Glynn, Mo., 177 S. W. 848.

71. **Landlord and Tenant**—Negligence.—Where goods of a tenant renting the south half of a storeroom are injured by the caving in of the roof by the clogging of a drainpipe running from the roof through the north half of the store, the tenant is not negligent in not preventing the clogging of the pipe.—Jonn Moodie Dry Goods Co. v. Gilruth, S. D., 153 N. W. 383.

72. **Libel and Slander**—Privilege.—Severe comment by a New Orleans newspaper on a resident of that city who had opposed its effort to secure the Panama Fair held privileged as comment on a news matter and on the acts of a public figure.—Flanagan v. Nicholson Pub. Co., La., 68 So. 964.

73. **Logs and Logging**—Growing Trees.—A conveyance of growing trees is a conveyance of an interest in the realty, and a mere transfer of the instrument by which the conveyance is made, does not transfer such interest.—Dillard v. Cusseta Naval Stores Co., Ga., 85 S. E. 701.

74. **Mandamus**—Meeting of Directors.—Mandamus will lie to compel the president of a corporation to call a special directors' meeting, where the necessary demand has been made as provided by the by-laws.—Cummings v. State, Okla., 149 Pac. 864.

75. **Master and Servant**—Contributory Negligence.—A telegraph lineman held not contributorily negligent as a matter of law in going on a pole without first securing it, where the pole had been inspected by the foreman.—Tweed v. Western Union Telegraph Co., Tex., 177 S. W. 957.

76.——Duty of Master.—A master need not furnish the safest or best appliances, and is not charged with negligence on a mere showing that a safer appliance might have been furnished, but an instrumentality reasonably safe for the purpose and in the manner intended to be used is sufficient.—Hosheit v. Lusk, Mo. App., 177 S. W. 712.

77.——Duty of Master.—The duty to furnish light at night, so as to make a reasonably safe place where a servant could work in the performance of his duty, held a continuing duty resting upon the master, for breach of which the master would be liable.—Yost v. Atlas Portland Cement Co., Mo. App., 177 S. W. 690.

78.——Employment.—Though the contract of hiring was one from day to day, third persons have no legal right to maliciously interfere so as to cause the master to terminate it.—McCarter v. Baltimore Chamber of Commerce, Md., 94 Atl. 541.

79.——Question for Jury.—Whether an employe's injury is due to negligence of the employer in failing to furnish competent fellow servants sufficient in number, or to some other cause, is for the jury, where there is any evidence tending to support such cause of action.—Sulzberger & Sons Co. v. Hoover, Okla., 149 Pac. 887.

80.——Respondeat Superior.—In servant's action for injuries in being struck by timbers while loading them on a railroad car under orders from substitute appointed by his foreman, defendant was liable for such orders under the rule of respondeat superior.—Allen v. Quercus Lumber Co., Mo. App., 177 S. W. 753.

81. **Mechanics' Liens**—Claim.—Inclusion of claim of lien for nonlienable materials held not to vitiate claim for lienable materials, where the lienable materials could be easily and readily separated from those which were not lienable.—Lowell Hardware Co. v. May, Colo., 149 Pac. 831.

82. **Monopolies**—Defined.—A corporation, although a combination of other large manufacturing corporations and having a very large capital, cannot be said to be inherently a monopoly, where during ten years its increase in percentage of business is much less than that of its principal competitors.—United States v. United States Steel Corporation, U. S. D. C., 223 Fed. 55.

83. **Mortgages**—Foreclosure.—A proceeding to foreclose a mortgage held not an equitable foreclosure, where there was no prayer for process or for equitable relief, and the petition, rule nisi, and rule absolute conformed to the statutory remedy.—Smith v. First Nat. Bank of Waycross, Ga., 85 S. E. 696.

84. **Municipal Corporation**—Ejusdem Generis.—Under the rule of ejusdem generis, held, that an ordinance to regulate and restrain porters, runners, agents, and solicitors for boats, vessels, stages, cars, public houses, "or other establishments," did not apply to the proprietor of a small clothing store.—State v. Kern, Minn., 153 N. W. 311.

85.——Nuisance.—A municipal corporation or sewer district cannot maintain a sewer and septic tank in such a manner as to constitute a nuisance and injure lower riparian owners on the stream, into which sewage flowed.—Jones v. Sewer Improvement Dist. No. 3 of City of Rogers, Ark., 177 S. W. 888.

86.——Salaries of Officers.—A city fixing by ordinance the salary of a marshal and by resolution employing him as night watchman may dispense with his services as watchman and limit his compensation to that fixed for marshal.—State ex rel. See v. Appling, Mo. App., 177 S. W. 751.

87.——Warning.—An automobile driver, on approaching children playing, should give warning and so manage his car that the children need not, to avoid injury, exercise the care that adults are expected to exercise.—Ratcliffe v. Speith, Kan., 149 Pac. 740.

88. **Obscenity**—Defense.—That the language used may have been quoted from a standard work on theology held no defense in a prosecution for violating an ordinance by using obscene language.—State v. Lowry, Minn., 153 N. W. 305.

89. **Officers**—Revocation of Commission.—That the governor revoked a commission obtained by giving a bond to account for emoluments of the office held not to relieve the sureties from liability for the emoluments of the office after such revocation, though the incumbent's adversary did not seek to oust him from office during the pendency of the contest.—Bowen v. Lovewell, Ark., 177 S. W. 929.

90. **Partition**—Action.—Suit for partition of tract redeemed or purchased from purchaser at sale under execution against executor held not maintainable, the sale being void as to a party not before the court who had made no conveyance of her interest.—Tribble v. Wood, Ala., 68 So. 986.

91. **Partnership**—Special Agreement.—No compensation for services will be allowed a partner who performed all the services for the firm, in the absence of a special agreement for such compensation.—Cole v. Cole, Ark., 177 S. W. 915.

92. **Perjury**—Materiality.—In perjury the matter sworn to need not be directly material, it being sufficient if it tends to prove or disprove a fact directly in issue, by giving weight or probability to evidence thereof.—People v. Senegram, Cal., 149 Pac. 786.

93. **Physicians and Surgeons**—Care and Skill.—Where a surgeon at the suggestion of his patient employed another surgeon to assist in an operation, the latter owed the patient the duty of exercising reasonable care and skill.—Walker v. Holbrook, Minn., 153 N. W. 305.

94. **Principal and Agent**—Misappropriation.—Where a bank received a draft as security for an agent's debt due the bank, knowing that the agent had no authority to so use the draft, misappropriating the funds of his principal, the

acceptor of the draft properly refused to pay the amount thereof to the bank.—Bank of Hoxie v. White, Ark., 177 S. W. 891.

95. **Railroads**—Contributory Negligence.—A pedestrian, seeing that railroad crossing gates were up, and walking on the crossing without noticing an approaching train, held guilty of contributory negligence.—Coyle v. Boston & Maine R. R., N. H., 94 Atl. 509.

96.——Trespasser.—A shipper of stock, injured when the train started while he was fastening the car door, is not a trespasser, but was rightfully at that place.—St. Louis & S. F. R. Co. v. Cole, Okla., 149 Pac. 872.

97. **Reference**—Implied Stipulation.—Where a litigant joins in a motion asking for a reference and that a particular person be appointed referee and empowered to settle the issues, and later files supplemental pleadings, he will be deemed to have stipulated that the power shall be exercised.—Kelly v. West, Okla., 149 Pac. 902.

98. **Sales**—Conditional Sales.—"Conditional sales" are merely executory agreements to sell, accompanied by delivery of possession to the intending purchaser, the title remaining in the vendor until the purchase price has been paid.—State v. Justice of Peace Court of Billings Tp., Yellowstone County, Mont., 149 Pac. 709.

99.——Damages.—Where a manufacturer repudiated his contract to furnish goods at certain prices until March 1st, he was liable for increased expense in procuring the goods ordered before such dates, but not for additional expense in procuring goods ordered thereafter.—Scott v. T. W. Stevenson Co., Minn., 153 N. W. 316.

100.——Recoupment.—Where an acetylene lighting plant has a small defect which can be corrected by a small outlay, the buyer must make the repair and recoup his loss from the seller, and cannot avoid payment of the purchase price.—C. B. Ensign & Co. v. Coffelt, Ark., 177 S. W. 735.

101. **Schools and School Districts**—Elections.—Where the several petitions to call an election to organize a consolidated school district do not name the separate districts to be included in such district or do not concur in the separate districts to be included, they are insufficient and a call for an election, and subsequent proceedings are void.—Smith v. State, Okla., 149 Pac. 884.

102. **Specific Performance**—Special Property.—Specific performance lies to compel delivery of shares of corporate stock, where they have no market value, are difficult to obtain, or there is some reasonable cause for their delivery, as bearing upon the control of the corporation.—Whiting v. Enterprise Land & Sheep Co., Mo., 177 S. W. 589.

103.——Statute of Frauds.—That a person promising to bequeath his property to adopted children owned a homestead as the principal part of his property held not to render the promise unenforceable as within the statute of frauds.—Hannemann v. Ott, Neb., 153 N. W. 506.

104. **Street Railroads**—Contributory Negligence.—One driving a smooth-shod horse down a slippery street held contributorily negligent in approaching a car track at such speed that he could not stop after seeing a car.—Grear v. Harvey, Mo. App., 177 S. W. 780.

105. **Taxation**—Capital Stock.—Capital stock, surplus, reserve funds, undivided profits, loans and discounts, banking furniture, and fixtures not realty and strictly banking utilities held not taxable to the bank or as items of personalty but of and to the shareholders, apportioned on a per share valuation.—Merchants' State Bank of Velva v. McHenry County, N. D., 153 N. W. 386.

106. **Telegraphs and Telephones**—Damages.—Where by mistake in a telegram a seller of oats was compelled to accept 40 cents a bushel instead of 45 cents, held that the seller could recover on the basis of the value of the oats at the shipping point, and show what he could have received for them at a regular terminal shipping point.—Carlon v. Western Union Telegraph Co., S. D., 153 N. W. 375.

107. **Tenancy in Common**—Mutual Rights.—Tenants in common of a spring, and pipe held to owe a duty each to the other to use the water in good faith with reasonable regard to the other's rights to his proportionate share, and without unnecessary injury to the other.—Duplesse v. Haskell, Vt., 94 Atl. 503.

108.——Presumption.—A presumption of title may arise by an exclusive and uninterrupted possession of one tenant in common for 20 years, claiming the land as his own, but such presumption may be rebutted by proof of disability on the part of the cotenants.—Drewery v. Nelms, Tenn., 177 S. W. 946.

109. **Tender**—Conditional.—A tender of the amount due under fraternal beneficiary certificate on condition that the beneficiary give a receipt in full, held conditional so as not to stop the accrual of interest.—Parker v. Tent Knights of Maccabees of the World, Mo., 177 S. W. 722.

110. **Trusts**—Failure of Trust.—The fact that a trustee of the notes and securities constituting a general legacy was not appointed until long after the death of the testator was immaterial, since a trust never fails by the mere failure of appointment or qualification of a trustee.—Asbury v. Shain, Mo. App., 177 S. W. 666.

111.——Marital Rights.—Deed of trust by wife, vesting her personalty in a trustee to pay the income to her until death and thereafter in accordance with directions, held not invalid as infringing her husband's marital rights in such property.—Brown v. Fidelity Trust Co., Md., 94 Atl. 523.

112.——Passive Trust.—Where one about to die indorsed money orders to plaintiff's order, sealed them in an envelope, and gave it to H. with directions that he give it to plaintiff if the donor died, the parol trust thus created was not an active, but a "passive, trust."—O'Brien v. Bank of Douglas, Ariz., 149 Pac. 747.

113. **Vendor and Purchaser**—Misdescription.—A misdescription of realty in a material point so far affecting the subject-matter of the contract that it may be reasonably supposed that but for such misdescription it would not have been made releases the purchase.—Hall v. Brown, Md., 94 Atl. 530.

114.——Purchase Price.—Where title passed to buyer of land and a desert land filing, and his rights under such filing were thereafter lost through his neglect to perform the necessary work on such land, plaintiff could recover the full purchase price without reduction.—Smith v. Johnson, S. D., 153 N. W. 376.

115.——Time of Essence.—Where contract for sale of realty specifically provided deposit should be returned if good title could not be given within 30 days, time was of the essence, and purchasers could recover deposit at expiration of such period.—Depavo v. Rizzo, Cal., 149 Pac. 793.

116. **Waters and Water Courses**—Condition Precedent.—Landowner's payment for water held a condition precedent to water company's duty to furnish, so that failure to terminate the contract on the failure to pay and continuance in furnishing water was a waiver of the right to terminate the contract.—Fresno Canal & Irr. Co. v. Perrin, Cal., 149 Pac. 805.

117.——Developed Water.—"Developed water" is water which is brought to the surface and made available for use by the party claiming the water.—Mountain Lake Mining Co. v. Midway Irr. Co., Utah, 149 Pac. 929.

118. **Wills**—Bequest.—An agreement by husband and wife to leave their property to an adopted child, which did not impose any restrictions on their conveyance during life, is valid, though it included parties' homestead.—Horner v. Maxwell, Iowa, 153 N. W. 331.

119.——Construction.—Where a testator made bequests to employes of ten years' standing, the date to be fixed as of January 1, 1911, payment will not be avoided because that day was a holiday and employes were not then actually at work.—In re Cowell's Estate, Cal., 149 Pac. 809.

120.——Estate Tail.—A devise of real and personal property to one and the lawful heirs of his body forever, but if he died leaving no lawful issue of his body, then over to another, created an "estate tail" in the first devisee.—In re Reeves, Del., 94 Atl. 511.